United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original w/ Affidavit of Mailing

76-6113

To be argued by
DAVID W. McMORROW

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6113

B
P/S

NATHAN GOLD,

Appellant,

—against—

SECRETARY OF HEALTH, EDUCATION and WELFARE OF THE UNITED STATES,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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Preliminary Statement

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York (Bramwell, *J.*) affirming the denial of Social Security disability insurance benefits to appellant Nathan Gold.

The district court's opinion is set forth in the appendix to this brief.

Statement of the Case

1. Facts

Appellant alleges that he became unable to work in 1963, at age 55, because of stomach trouble and arthritis

(Tr. 78).[1] Appellant was born in Poland in 1908 and had approximately nine years of education (Tr. 107). He lived in Germany from 1920 until 1925 (Tr. 48) and in Poland from 1925 until 1941 or 1942 when he was forced to relocate to Russia. In 1953 appellant emigrated to the United States and married for the first time a year later (Tr. 87, 42).

He found seasonal employment as a machine operator in the clothing manufacturing industry in New York between 1953 and 1956 (Tr. 42), and worked as a cutter for a plastic slipcover manufacturer from 1956 until 1960 when the manufacturer switched to heavier gauge plastic which plaintiff was unable to handle (Tr. 6, 33). Thereafter, plaintiff held miscellaneous jobs of short duration, including working as a rabbinical supervisor for a catering service (Tr. 44, 105) and as a salesman at retail food counters on the Boardwalk in Brooklyn (Tr. 47, 109).

Appellant is married and lives with his wife who is unemployed (Tr. 42). His daily activities are limited. He spends most of his time in a nearby park watching people play checkers (Tr. 108). He attends services every Saturday in a local synagogue (Tr. 64) but no longer takes an active part in its activities (Tr. 65). His income consists of $51.20 a month Social Security retirement insurance benefits (Tr. 40) and $108 a month from the German Government in the nature of indemnification for damage to him during the Nazi regime (Tr. 48). The medical evidence is discussed in the body of the brief and is therefore not summarized here.

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[1] References are to the record and transcript of the administrative proceedings herein, three copies of which have been filed with this court pursuant to Rule 30(f) of the Federal Rules of Appellate Procedure and Rule 30 of the rules of this Court.

2. Proceedings Below

Appellant first applied for disability insurance benefits on February 8, 1966, claiming inability to work since 1963 due to nervous condition, ulcer, hernia, dizziness and back pains (Tr. 69-72). This claim was denied on August 24, 1966, by the Bureau of Disability Insurance of the Social Security Administration because appellant refused to submit to an examination by a psychiatrist (Tr. 73-76). Appellant, who last met the earnings requirement for disability insurance on December 31, 1966, filed another application for disability insurance benefits on July 11, 1969—2½ years after the expiration of his insured status—claiming inability to work since 1963 due to stomach troubles and arthritis (Tr. 78-81). This claim was denied initially (Tr. 82-84) and on reconsideration (Tr. 93) by the Bureau of Disability Insurance of the Social Security Administration, after an evaluation of the evidence by a physician and a disability examiner resulted in a finding that appellant was not under a disability on or before December 31, 1966, the date when he was last covered by disability insurance (Tr. 91-92). Appellant then requested an administrative hearing for de novo review of his case (Tr. 26).

The hearing examiner before whom appellant appeared considered the case and on September 21, 1970, found that appellant was not under a disability in that his impairments—a hiatus hernia and minimal osteoarthritis—were not severe enough, either singularly or collectively, to preclude all forms of substantial gainful employment on or before December 31, 1966 (Tr. 16-19). The Appeals Council of the Bureau of Hearings and Appeals of the Social Security Administration affirmed the decision of the hearing examiner on November 23, 1970 (Tr. 4). Hence the decision of the hearing exam-

iner became the final decision of the Secretary. Having exhausted all administrative remedies, the appellant then filed an action in the United States District Court for the Eastern District of New York on January 20, 1971. On July 25, 1975, both parties moved for judgment on the pleadings. On February 25, 1976, the Court below (Bramwell, *J.*) granted the defendant's motion. Plaintiff-appellant now appeals to this Court.

ARGUMENT

The decision of the secretary that appellant was not under a disability is supported by substantial evidence and should be affirmed.

On appeal appellant appears to urge two main grounds for reversal of the district court decision: (1) the hearing examiner did not give sufficient consideration to appellant's subjective complaints of pain, and (2) there was no basis for the hearing examiner's determination that appellant could return to work as a cutter in the plastics industry or as a rabbinical supervisor, or that he could teach Hebrew.

Appellant's claims are without merit, for there was more than substantial evidence to support the hearing examiner's findings.

[illegible] 42 U.S.C. § 423(d)(5), an individual ". . . shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require." The ultimate burden of persuasion therefore rests upon the appellant *Franklin* v. *Secretary of HEW*, 393 F.2d 640 (2d Cir. 1968). A claimant such as appellant must prove that he is unable to engage in any substantial gainful

activity by reason of any medically determinable physical or mental impairment of requisite severity which lasted or could have been expected to last for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A).[2] Moreover, the impairments must result from "abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3).

In this case, the hearing examiner found that appellant was not under a disability, basing his decision on ". . . the credible evidence . . ., after having carefully considered the entire record in this case . . ." (Tr. 19). This finding is binding upon the reviewing court if supported by "substantial evidence." 42 U.S.C. § 405(g). The United States Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971). Thus, if the administrative finding is reasonable, the reviewing court may not substitute its judgment for that of the Secretary. *Laws* v. *Celebrezze*, 368 F.2d 640 (4th Cir. 1966).

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[2] 42 U.S.C. § 423(d)(2)(A) defines the degree of severity needed to render a claimant disabled:

> (A) an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Appellee recognizes that recent cases in this Court have held that the Social Security Act is to be "broadly construed and liberally applied . . . .", *Gold* v. *Secretary of HEW*, 463 F.2d 38, 41 (2d Cir. 1972); *Cutler* v. *Weinberger*, 516 F.2d 1282 (2d Cir. 1975), and that the hearing examiner must closely scrutinize all of the relevant facts when a claimant appears at a hearing *pro se*, as did appellant. *Gold* v. *Secretary of HEW*, *supra*, at 43.[3] However the instant case does not suffer from the infirmities which were in the records before this Court in *Gold* v. *Secretary of HEW*, *supra*, and *Cutler* v. *Weinberger*, *supra*. The hearing examiner here attempted to elicit relevant information from appellant at the hearing (Tr. 27-68) and "carefully combed the entire medical record" (Tr. 18), which is quite substantial, before rendering his opinion. As we will show, his conclusion that appellant's impairments were not severe enough to preclude substantial gainful activity on or before December 31, 1966, is amply supported by "substantial evidence" of record.

1. The Administrative Hearing Examiner Considered Appellant's Pain In Making his Determination

This Court has held that pain alone may establish disability. *Ber* v. *Celebrezze*, 332 F.2d 293 (2d Cir. 1964). However such pain must be of a "severe and intractable nature." *Sanders* v. *Weinberger*, 1A CCH Unempl. Ins. Rep., Fed., ¶ 14,503 (E.D.N.Y. 1974). In the instant case the hearing examiner "carefully combed

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[3] Appellant appeared *pro se* at the administrative hearing and throughout these proceedings until the Government moved for judgment on the pleadings, at which time appellant consulted and retained the Legal Aid Society, Office for the Aging, 1685 East 15th Street, Brooklyn, New York.

the entire medical record" (Tr. 18), which clearly records appellant's many complaints. In addition, the hearing examiner specifically elicited statments from appellant about his complaints (Tr. 34). Appellant's contention could not be, therefore, that the hearing examiner failed to consider his claims of pain, but, rather, that he failed to believe that pain existed in such severity and in such an amount as to preclude appellant from engaging in the work which he had done in the past.

While a claimant's pain is a proper consideration in determining disability, ". . . it does not follow that every claim of disabling pain must be accepted by the hearing examiner." *Scherillo* v. *Richardson*, 1 CCH Unempl. Ins. Rep., Fed., ¶ 16,808 (E.D.N.Y. 1972), at p. 2499-41. Congress required claimants to furnish proof of their disability because it was concerned with the unexpectedly large number of claims that were being paid. 1967 U.S. Code Cong. & Adm. News 2880. Consistent with this concern, the courts in this circuit have not required the hearing examiner to accept at face value a claimant's subjective testimony as to the amount of pain he suffers. *Mann* v. *Richardson*, 323 F. Supp. 175 (S.D.N.Y. 1971); *Selig* v. *Richardson*, 379 F. Supp. 594 (E.D.N.Y. 1974). *See also Peterson* v. *Gardner*, 391 F.2d 208 (2d Cir. 1968). In *Selig* v. *Richardson*, *supra*, the Court (Neaher, *J.*), stated that ". . . . the credibility to be given to testimony of witnesses and the weight to be given to evidence are matters to be determined by the Secretary . . . and conflicts in evidence are also matters to be resolved by him." 379 F. Supp. at 598-599.

Appellant was apparently injured in a building collapse in Russia during the war, which he claims, is the source of the nasal obstruction, headaches and stomach

pains which he now allegedly suffers (Tr. 55, 101, 164). In addition, he stopped working in 1960 because of "shocks" to his system caused by the weight and chemical composition of plastic rolls (Tr. 6, 33). He contends that by 1963 these ailments, together with his arthritis, prevented him from engaging in any gainful employment. However, while the medical evidence indicates that appellant sought attention at several hospitals and clinics and from different physicians for a variety of complaints from 1956 to 1969, it fails to indicate impairments which rise to the level of disability claimed by appellant. It should be noted that evidence regarding ailments after December 31, 1966, can be properly considered only to the extent that it demonstrates the existence and severity of an impairment which existed on or before that date. *Carnevale* v. *Gardner*, 393 F.2d 889, 890 (2d Cir. 1968); *Selig* v. *Richardson*, *supra*.

Appellant was treated at the Coney Island Hospital for a shoulder pain in 1956 and for an ear infection in 1962 (Tr. 112), but these appear to have been one-time treatments. He was admitted to the University Hospital in January, 1965, because of difficulty breathing through his nose, but a systems review, physical examination and laboratory report were essentially negative except for a deviated septum (Tr. 134). Indeed, the hospital report noted in its final summary that, "[t]his is a well developed white male in no distress." Appellant did undergo a nasal resection operation at the University Hospital, but he did well postoperatively and was discharged (Tr. 134). He was examined later that year at the Kings County Hospital clinic for sinus problems (Tr. 136). Appellant was admitted to the Kings County Hospital on May 3, 1966 for what was diagnosed as "chronic laryngitis" and released ten days later (Tr. 150).

The reports of three private doctors who examined appellant prior to the expiration of his insured status are inconclusive as to the nature and severity of his impairments. Maurice D. Elkind, M.D., a general practitioner, reported in February 1966 that he had seen appellant on one occasion, in August 1965, for treatment of a respiratory infection (Tr. 161-163). No clinical data or diagnoses were furnished. Jacob B. Glenn, M.D., also a general practitioner, stated on a short note, dated March 7, 1966, that he had treated appellant from 1963 to 1965 for arthritis, hypertension, nervousness and a postgastric ulcer condition (Tr. 148-149). However, Dr. Glenn did not furnish any clinical data or findings with respect to these ailments. Finally, Harry Grodzicker, also a general practitioner, examined appellant in February 1966 and itemized his ailments as "generalized arthritis", gastric neurosis and a postgastric ulcer (and one other undecipherable ailment), adding the statement that "appellant was completely disabled for employment" (Tr. 164).[4] Subsequently, however, Dr. Grodzicker revised his diagnoses of "generalized arthritis" and stated that appellant had osteoarthritis of his spine, arms, legs and neck, although "without any limitation of motion" (Tr. 166). Dr. Grodzicker also stated that appellant "had serious mental problems" (Tr. 166).

Appellant was examined in April 1966, by Biaggio Battaglia, M.D., at the Government's request, in connection with his first application for disability benefits (Tr.

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[4] The opinion of one physician as to a claimant's disability is not binding on the Secretary. See *Hall* v. *Celebrezze*, 238 F. Supp. 153 (E.D. Ky. 1963), *aff'd* 340 F.2d 608 (6th Cir. 1965). The weight to be given a physician's statement depends upon the extent to which it is consistent with other evidence as to severity and probable duration of the claimant's impairment. 20 C.F.R. § 404.1526.

168-176). Dr. Battaglia's concluding diagnoses was a deviated septum, acute or subacute epiglottic inflammation, minimal fibrosis of the left lobe, and possible cerebral arteriosclerosis (Tr. 170). Dr. Battaglia found "no evidence of arthritis on examination". Appellant had a normal gait, manifested no shortness of breath after walking, and tolerated all activity without respiratory or cardiac impairment (Tr. 169). Indeed, Dr. Battaglia stated that "[t]he only significant finding was persistent cough during the exam" (Tr. 169). When Dr. Battaglia was specifically asked whether he believed that appellant's physical defects prevented him from engaging in his usual ordinary activities, Dr. Battaglia only stated that it was his impression "that the cerebral arteriosclerosis is probably playin a major part in this claimant's impairment" (Tr. 176).

The Department of Social Welfare recommended that appellant be examined by a psychiatrist with respect to Dr. Battaglia's finding of "probable cerebral arteriosclerosis" to determine its affect on his functional capability (Tr. 176). As noted above (Proceedings Below, *supra*, at 3), appellant's first application for disability benefits was denied when appellant refused to submit to this examination (Tr. 74-75). The determination form indicates that the Department of Social Welfare sought to elicit appellant's cooperation, but that he and his wife thought that "somebody was out to get them" and were extremely uncooperative (Tr. 74).

The medical evidence subsequent to December 31, 1966, supports the hearing examiner's finding that appel-

lant had a hiatus herina and minimal ostearthritis, but fails to establish that these impairments were severe enough as of that date to render appellant disabled. Appellant was examined at the Coney Island Hospital in December 1967 complaining of constipation which was treated with mineral oils, and of gas pains which were treated with antiacids (Tr. 113). The treating doctor found appellant to be in acute dispress and listed his "impressions" as poor sphincter control, left inquinal hernia and deviated septem (Tr. 114). An X-ray analysis done in April, 1968, showed that appellant had "minimal osteoarthritis" in both knees (Tr. 126) and a flouroscopic analysis showed a "hiatus hernia" (Tr. 125). Appellant's left inquinal hernia was repaired by an operation in July 1969, at which time appellant was observed to be a "[w]ell nourished, well developed white male in no acute distress." (Tr. 159). Appellant continued to visit the Coney Island Hospital throughout 1968 and 1969 with a variety of complaints (Tr. 115-123). Appellant also visited the Mt. Sinai Hospital outpatient clinic from April 1969 through June 1969. He was nervous and had "numerous complaints", but clinical examination confirmed the earlier diagnosis of a "hiatus hernia" (Tr. 146).

Appellant was referred for psychiatric examination in February 1969 to Bernard Hecht, M.D., a staff psychiatrist at Coney Island Hospital, after the doctor who had been attending appellant since December 1967 noted in a report that appellant was "very nervous," had "vague complaints" and was very "anxious to see a psychiatrist" (Tr. 132). Dr. Hecht reported that appellant had a distinct impairment of memory and "many complaints of various parts of his body for which no physical basis . . . has been discovered" (Tr. 132). Dr. Hecht's diagnosis was "hypochrondriacal neurosis" and "organic brain syn-

drome, insipient, secondary to circulatory disturbance" (Tr. 132). He concluded that appellant's "complaints are as much a part of him as his nose and, in my opinion, nothing can be done to eliminate them. However, I believe they are somewhat exaggerated; both iatrogenic and epinosic being important in their origin and maintenance." (Tr. 132).

The medical record was reviewed for the Social Security Administration by two consulting physicians, a phychiatrist and a neurologist, to determine if the evidence of record indicated that appellant was disabled within the meaning of the statute on or before December 31, 1966. Dr. Harry M. Murdock, a psychiatrist, reviewed the medical evidence on Deecmber 22, 1969, and made the following statement: "I am unable to discover any indication of serious psychopathology when this man's earning requirement was last met December 31, 1966, or for that matter, at the present time" (Tr. 179). Dr. Anatol H. Oleynick, a neurologist, also reviewed the medical evidence on December 22, 1969, and stated that, from the neurological standpoint, there was no evidence that the plaintiff had any signs or symptoms of organic deterioration that would meet the disability requirement of the law (Tr. 181). Although these physicians did not examine appellant, their opinions can serve as the basis for evidentiary inference as to the ultimate fact. *Laws* v. *Celebrezze*, 368 F.2d 640, 644 (4th Cir. 1966).

Although the record is replete with appellant's recorded complaints of aches and pains and although there might be room for disagreement as to the existence and severity of appellant's pain, it can hardly be argued that there is not sufficient evidence in the record to support the decision of the hearing examiner, whose function it is to resolve such questions, that appellant's diagnosed impairments were not severe enough to render

appellant disabled. *Gaultney* v. *Weinberger*, 505 F.2d 943 (5th Cir. 1974); *Selig* v. *Richardson*, *supra*. The mere presence of osteoarthritis is not enough to establish disability under the Act. *Woods* v. *Finch*, 428 F.2d 469 (3d Cir. 1970); *Durham* v. *Gardner*, 392 F.2d 168 (4th Cir. 1968).

Moreover, this Court cannot ignore the fact that appellant made his claim much more difficult to prove by his unwillingness to cooperate with the Government at the time of his 1966 disability application. Appellant's refusal to submit to a psychiatric examination and his action in waiting until two and one half years after the expiration of his insured status to make another application make it extremely difficult for him to meet his burden of proof.

Finally, the observations of this Court in another case involving a person who claimed to be disabled because of arthritis and headaches, *Adams* v. *Flemming*, 276 F.2d 901 (2d Cir. 1960), are particularly relevant here:

> Judicial notice can be taken of the fact that the human anatomy is subjected to many ills. There are undoubtedly millions of people suffering daily from some infirmity: those who go to work with sinus conditions in varying degrees; those whose arthritic and rheumatic symptoms flare up and subside; those who are afflicted with migraine headaches which seriously affect temporarily their ability to work; and those who suffer from various spinal ailments and discomforts. None of these persons can be said to be unable to engage in any substantial gainful activity. 276 F.2d at 904 (footnote omitted).

2. The Hearing Examiner properly concluded that there was substantial gainful employment in which appellant could engage, given his impairments

Appellant suggests that he made out a prima facie case that he was unable to perform his former employment as a cutter of heavy plastics and that it was therefore incumbent upon the Secretary to introduce evidence establishing the existence of substantial gainful employment in which appellant could engage. *Bradey* v. background and employment history. *Brandon* v. *Gardner*, 377 F.2d 488 (4th Cir. 1967). However, as the district court correctly observed, since appellant failed to initially establish the existence of an impairment which rendered him disabled, it was not necessary for the Secretary to shoulder the burden of showing gainful employment in which appellant could engage. *Bradley* v. *Ribicoff*, 298 F.2d 855, 858 (4th Cir.), *cert. denied*, 370 U.S. 951 (1962). Implicit in the finding that appellant was not disabled is the determination that he is not precluded from engaging in employment for which he is qualified. The record clearly supports the hearing examiner's finding that appellant had the experience and capacity to work at light positions which he had held in the past notwithstanding his impairments.

First, the hearing officer concluded that there is a possibility that appellant could return to his position as a cutter in the plastics industry, (Tr. 18) presumably for a manufacturer who used lighter gauge materials. The primary reason given by appellant for his decision to leave his job as a cutter was a change by his employer to heavier materials which appellant could not handle (Tr. 6, 33), notwithstanding the statement of appellants' employer in the letter attached to appellant's brief that appellant lifted heavy weights without difficulty and was laid off due to a change in cutting methods. Since appel-

lant handled lighter guage materials as a cutter before his employer switched to heavier materials he obviously had the experience and capacity to engage in this type of work.

Second, appellant could supervise preparation of food in accordance with Jewish dietary laws since the records indicates that he worked in this capacity for at least six weeks in 1962 or 1963 for a large caterer in Queens (Tr. 41, 105). This is a skill which appellant acquired in Europe (Tr. 105). Appellant testified that the work was very light and did not require him to use his hands (Tr. 41) and that he worked five hours a day, four days a week (Tr. 105). Appellant claims he was offered a permanent position with this caterer, but was unable to accept it because he was often sick and could only work when he was "feeling good" (Tr. 46, 105). However, in his brief appellant asserts that he did not accept this job because the commute from his home in Brooklyn to Queens was too long and involved a fifteen minute walk (Appellant's Brief p. 4, ¶ 3). The fact that this position was available outside of appellant's immediate neighborhood does not negate his ability to perform this position since it is not necessary that jobs exist in the immediate area where appellant lives in order to sustain a denial of benefits. *Miller* v. *Finch*, 430 F.2d 321 (8th Cir. 1970). Appellant's assertion that he was not specifically trained to act as a rabbinical supervisor is irrelevant since it is beyond peradventure that he could and did work in this capacity.

Finally, appellant testified that he volunteerd to teach Hebrew to Bar Mitzvah students in his synagogue who could not afford to pay for lessons from professional instructors (Tr. 65, 108). The hearing examiner could thus properly conclude, as he did, that if appellant could teach Hebrew on a voluntary basis he could do so for remuneration.

In sum, the district court was clearly correct in holding that the Secretary's decision denying appellant's claim for disability benefits was supported by substantial evidence. Not only does the medical record fail to establish the existence of constant, irremedial ailments which would give rise to the disabling pain which appellant claims to suffer, but it fails to establish appellant's inability to engage in varieties of light employment which he had performed in the past. Moreover, efforts to confirm the existence and severity of an impairment relative to Dr. Battaglia's diagnosis of "probable cerebral arteriosclerosis" were thwarted by appellant himself.[5]

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[5] Appellant also makes numerous factual allegations which are either groundless or irrelevant.

Appellant contends that Dr. Battaglia refused to X-ray him, pulled his tongue abusively and forced him to undergo an unnecessary biopsy (Appellant's Brief, p. 2 ¶ 4-6). Dr. Battaglia's report specifically refers to a chest X-ray of appellant (Tr. 170). When contacted about appellant's complaints in May 1966, Dr. Battaglia stated that he had to pull on appellant's tongue to view his vocal cords and epiglottis but that he did not use unnecessary force (Tr. 176). The biopsy was obviously a precautionary measure in the best interests of the patient and need not be defended.

Appellant also contends that his refusal to be examined by a "neurologist" (appellant refused to be examined by a psychiatrist) was based on a fear that he would be subjected to the same abuse he allegedly sufferd from Dr. Battaglia (Appllant's Brief, p. 2 ¶ 6, p. 3 ¶ 1). However, regardless of appellant's claims, it is clear from the record that the Social Security Administration sought to assuage his fears and enlist his cooperation (Tr. 74-75) in an attempt to determine whether or not appellant was suffering mental disability when it sought to have him examined by a psychiatrist.

Similarly, appellant's claim that his wife was not permitted to act as his representative at the administrative hearing (Appellant's Brief, p. 3, ¶ 3) is a bald assertion unsupported by any objections or testimony in the transcript of the hearing (Tr. 29-68).

Appellant's further assertion that the transcript is a distortion of his testimony and impossible to understand (Appellant's Brief p. 3 ¶ 3) is also refuted by the record. The transcript indicates

[Footnote continued on following page]

only that appellant's answers were sometimes disjointed and that he occasionally had difficulty expressing himself in English. Appellant's objection seems to be that the transcript does not reflect what he meant as opposed to what he said. Also, a transcript is not fatally defective because it has numerous inaudible words which could not be transcribed. *Kessler* v. *Government Services Administration*, 252 F. Supp. 629 (S.D.N.Y. 1966).

Nor does the record support appellant's assertion (Appellant's brief, p. 5, ¶ 1) that he was tricked into seeing Dr. Hecht, the staff psychiatrist at Coney Island Hospital, or that Dr. Hecht did not consult with him. Indeed, the notations of the consulting physician state that appellant was "anxious to see a psychiatrist" (Tr. 132) and the contents of the report of Dr. Hecht evidence the fact that he examined appellant (Tr. 132). Appellant's further allegation of a conspiracy between Coney Island Hospital and his landlord is not supported by the record and does not merit a response.

Appellant's contention that he was denied an opportunity to present evidence to the district court is also meritless (Appellant's Brief p. 6, ¶ 5-6). Appellant retained competent counsel to represent him before the district court. The evidence to be presented and the mode of presentation was within the discretion of appellant's counsel. Moreover, the evidence to which appellant refers —the letter from a former employer, attached to appellant's brief —certainly does not support his claim that he quit his job as a cutter in 1960 because he was unable to handle heavier guage plastic. Rather, it establishes that appellant was capable of handling heavy weights in 1960 and that he was laid off because of a change in cutting procedures.

The only allegation which is supported by the record is appellant's claim that the hearing examiner refused to furnish him with a copy of Dr. Battaglia's medical report (Appellant's Brief p. 3, ¶ 4). The hearing examiner was understandably concerned about appellant's hostile attitude toward Dr. Battaglia and how the report might be used (Tr. 65-67). In any event, the refusal to give the report to appellant did not prejudice him. Appellant was given an opportunity to read the report before and at the hearing (Tr. 30) and his questions and objections indicate that he did in fact read it (Tr. 33). The hearing examiner agreed to send a copy of the report to any doctor or attorney appellant might recommend (Tr. 67). Moreover, appellant was eventually furnished with a copy of the report when he commenced this action. It should be noted that while there are regulations governing the conduct of administrative hearings, 20 C.F.R. § 404.917 et seq., there is no requirement that a hearing examiner furnish a claimant with copies of exhibits.

CONCLUSION

For the reasons set forth herein, and upon the adminstrative record and opinion below, the judgment of the United States District Court for the Eastern District of New York in this action should be affirmed.

Respectfully submitted,

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APPENDIX

Memorandum and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

71 C 76

NATHAN GOLD,

Plaintiff,

—against—

SECRETARY OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES,

Defendant.

BRAMWELL, *D.J.*

Mr. Nathan Gold instituted this action pursuant to 42 U.S.C. § 405(g) to review a final decision of the Secretary of Health, Education and Welfare denying Mr. Gold's application for a period of disability and disability insurance benefits. The claimant initiated this proceeding in a *pro se* capacity but retained counsel in May, 1975 after being served with the defendant's notice of motion for judgment on the pleadings. The claimant has filed a cross-motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Briefly stated, the facts in this case are as follows: On July 11, 1969, Mr. Gold applied for disability insurance benefits and for the establishment of a period of disability from October 1, 1963 (R. 84), the date on which he alleges he became unable to work. In order to qualify for disability insurance benefits under 42 U.S.C. § 423, the claimant must show that he was disabled on or prior to the last date on which he was insured under

the Social Security Act (hereinafter the "Act"). 42 U.S.C. §§ 416(i) and 423(c). It is not disputed that in this case the last insured day for Mr. Gold was December 31, 1966 (R. 30, 83). Therefore, to receive disability benefits, Mr. Gold must have been unable ". . . to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A).

Mr. Gold's application was denied initially and again upon reconsideration. It was found that although impairment existed prior to December 31, 1966, it was not of such severity to preclude all work activity during the time period at issue (R. 83, 92). Mr. Gold was found not to be disabled [1] as defined by 42 U.S.C. § 423(d)(1)(A) and was thus found not entitled to the benefits of the Act.

Upon Mr. Gold's request, a hearing was held on September 8, 1970 in which the hearing examiner found that

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[1] Under 42 U.S.C. § 423(d)(a)(A), a claimant will be considered disabled

> . . . only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

the claimant's impairment[2] consisted of a hiatus hernia and minimal osteoarthritis (R. 19). Again, it was found that these impairments were not severe enough to preclude all substantial gainful activity during the period in question (R. 19). It was also found that Mr. Gold was educated and had been trained in Europe to be a supervisor of kosher food preparation (R. 18). It was further found that the claimant had worked in this capacity for a short time and that such work was light work of the type which Mr. Gold was able to engage in, in view of his impairments (R. 17, 18). The decision of the hearing examiner was affirmed by the Appeals Council and thus became the final decision of the Secretary (R. 4).

Mr. Gold asks this court to review the findings of the Secretary. In reviewing administrative decisions, the issue before this court is whether or not the findings of the hearing examiner are supported by substantial evidence. If on the record, taken as a whole, "substantial evidence" is found to support the findings, then the administrative decision must be affirmed. 42 U.S.C. § 405 (g); *Gold* v. *Secretary of Health, Education and Welfare*, 463 F.2d 38, 41 (2d Cir. 1972).

"Substantial evidence" has been described as more than a scintilla; it must do more than create a suspicion of the existence of a fact to be established. *National Labor Relations Board* v. *Columbian E. & Stamping Co.*, 306 U.S. 292, 299, 59 S.Ct. 501, 505 (1939); *Universal*

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[2] Under 42 U.S.C. § 423(d)(3), the term "impairment" includes a physical or mental impairment and is one

> . . . that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory techniques.

Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474, 477, 71 S.Ct. 456, 459. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id; Consolidated Edison Co., of New York* v. *National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938).

The possibility that two inconsistent conclusions may be drawn from the evidence does not prevent the administrative decision from being supported by substantial evidence, *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026 (1966) irrespective of the fact that this court may have reached a contrary result if it held a hearing *de novo*. *John W. McGrath Corp.* v. *Hughes*, 264 F.2d 314, 317 (2d Cir. 1959).

After a thorough consideration of the record as a whole, it is found for the reasons that follow that the decision of the Secretary is supported by substantial evidence.

The claimant bears the burden of proving that his impairment is of such severity as to render him disabled with "such medical and other evidence of the existence thereof as the Secretary may require". 42 U.S.C. § 423 (d)(5); *Adams* v. *Flemming*, 276 F.2d 901, 903 (2d Cir. 1960). After reviewing all of the evidence, the Secretary determined that this burden was not met.

The record shows that the claimant sought medical attention from different physicians and at different clinics and hospitals from 1956 to 1969. Upon admission to University Hospital on January 19, 1965, a systems review and physical examination were essentially negative except for a marked nasal septum deviation. The medical

record evidencing this treatment noted that Mr. Gold was a "well developed male in no distress" (R. 134). In May, 1966, Mr. Gold was treated at Kings County Hospital. The Kings County Hospital abstract of the medical record from this time that was admitted into evidence failed to mention arthritis as one of the claimant's medical problems (R. 150). Mr. Gold was treated at Kings Highway Hospital in 1969. The medical records of Kings Highway Hospital that were submitted into evidence also failed to mention arthritis as one of Mr. Gold's medical problems (R. 151-160). Mr. Gold was also treated at Coney Island Hospital at irregular intervals from June 1, 1956 to February 19, 1969 (R. 111-132). After films were made of both knees and elbows, the hospital's report of April 23, 1968 concluded that the claimant had minimal osteoarthritis in both knees and minimal ligamatous calcifications in the left elbow, right knee and quadriceps (R. 126).

The record further contains numerous doctor's reports. Dr. H. Grodziker, who examined Mr. Gold on February 4, 1966, was the only physician who concluded that Mr Gold was "completely disabled for employment". (R. 164). The evidence submitted shows that none of the other examining or consulting physicians reached this conclusion. Two consulting doctors concluded that the claimant's condition did not meet the requirements of a disability as defined by law (R. 179, 181). Upon examination in February, 1966 Dr. H. Grodziker found that Mr. Gold suffered from arthritis (R. 164). However, Dr. Biagio Battaglia, the government's examining physician, examined Mr. Gold on April 26, 1966 and found "no evidence of arthritis on examination." (R. 170).

Mr. Gold further contends that the hearing examiner failed to meet the burden of showing substantial gainful employment in which the claimant could engage. The hearing examiner found that the record did not disclose "an impairment severe enough to warrant considering the claimant as meeting the disability requirements of the Social Security Law" (R. 18). Mr. Gold contends that whenever a disability claimant has established a prima facie case that he is unable to perform his former employment, the burden of proof shifts to the Secretary to present evidence that the claimant can engage in substantial gainful employment that is reasonably available in the national economy. *Paul* v. *Ribicoff*, 206 F. Supp. 606, 612 (D.C. Colo. 1962). However, the claimant must still initially prove that he is disabled as set forth in 42 U.S.C. § 423(a) and (d). Since it was found that Mr. Gold failed to establish an impairment which disables him within the terms of the Act, it is unnecessary to consider Mr. Gold's employment history, age or background. *Laws* v. *Celebrizze* [sic], 348 F.2d 640, 645 (4th Cir. 1966); *Bradley* v. *Ribicoff*, 298 F.2d 855, 858 (4th Cir. 1962); *cert. denied*, 370 U.S. 951, 82 S.Ct. 1401 (1962). The hearing examiner found that there was a possibility that Mr. Gold could return to his work as a cutter in the plastics industry, although the claimant denied any such ability.

Even if Mr. Gold had established a disability as defined by the Act or if it was found that he was unable to return to his old employment, the hearing examiner found that according to Mr. Gold's testimony, Mr. Gold had been trained in Europe as a supervisor in kosher food (R. 45, 18), that he had utilized this skill and worked as a rabbinical supervisor in 1962 or 1963 (R. 44),

and that this was the type of work in which Mr. Gold could have engaged in view of his impairments during the period in question (R. 18, 19). The hearing examiner also found that Mr. Gold was able to teach Hebrew to children (R. 18). The hearing examiner concluded that the impairments suffered by Mr. Gold did not cause inability to engage in any substantial gainful activity (R. 19).

After a thorough consideration of the record as a whole, it is therefore found that the decision of the Secretary is supported by substantial evidence. Accordingly, the claimant's cross-motion is denied and the Secretary's motion for judgment on the pleadings is granted.

So Ordered.

Henry Bramwell
U.S.D.J.

Dated: Brooklyn, New York
February 25, 1976

★ U. S. Government Printing Office 1976— 714—018—5

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 15th day of October 19 76 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Mr. Nathan Gold
3100 Ocean Parkway
Brooklyn, N. Y. 11224

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

15th day of October 19 76

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4619218
Qualified in Queens County
Commission Expires March 30, 1977